Supreme Court, U.S.
FILED
941990 JUN 5 - 1995
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANR PIPELINE COMPANY and
COLORADO INTERSTATE GAS COMPANY,
Petitioners,

v.

THE STATE BOARD OF EQUALIZATION
and THE OKLAHOMA TAX COMMISSION,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

REBECCA H. NOECKER*
KAREN L. PAULEY
VIRGINIA G. AMEND
P.O. Box 1087
COLORADO SPRINGS, CO
80944
(719) 520-4767
Counsel for Petitioners

June 5, 1995

* *Counsel of Record*

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

TOPP

QUESTION PRESENTED

Whether, under the federal Equal Protection Clause, a state's decision to elect one method of compliance with a federal anti-discrimination statute constitutes a rationally based legitimate state interest sufficient to justify discriminatory tax treatment of similarly situated taxpayers, even though the state could elect other methods of compliance which treat similarly situated taxpayers the same.

PARTIES TO THE PROCEEDING

The following parties participated in the proceedings below and are petitioners: ANR Pipeline Company and Colorado Interstate Gas Company.[1]

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

The Coastal Corporation, through wholly owned intermediate subsidiaries, is the ultimate parent company of ANR Pipeline Company and Colorado Interstate Gas Company, neither of which has subsidiary corporations other than those wholly owned.

---

[1] Additionally, the following parties were in the proceedings below: Petitioners—Williams Natural Gas Company, Williams Pipeline Company, and Williams Telecom Group; Respondents—The State Board of Equalization and The Oklahoma Tax Commission; and other Intervenors—El Paso Natural Gas Company, Transwestern Pipeline Company, Enron Oil and Gas Marketing, Black Marlin Pipeline Company, Explorer Pipeline Company, Aquila Gas Systems, Inc., Sun Pipeline Company, Mid-Continent Pipeline Company, Northern Natural Gas Company, Natural Gas Pipeline Company of America, and Western Gas Resources, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
DISCLOSURE STATEMENT PURSUANT TO RULE 29.1 ii
TABLE OF AUTHORITIES . . . . . iv-v
OPINION BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT 2
A. Factual Background 2
B. Proceedings Below 3
REASONS FOR GRANTING THE PETITION . . 5
CONCLUSION 15

TABLE OF AUTHORITIES

Cases	Page
Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336 (1989)	5,6,9,11,14
Cumberland Coal Co. v. Board of Revision, 284 U.S. 23, 28-30 (1931)	10
Department of Revenue of Oregon v. ACF Indus., Inc., 127 L. Ed. 2d 165, 171 (1994)(citing *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987))	6,7,11
Edelman v. Jordan, 415 U.S. 651, 671 (1974)	12
F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)	9
Federal Express Corp. v. Tennessee State Bd. of Equalization, 717 S.W.2d 873 (Tenn. 1986)	6
Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985)	9
In re ANR Pipeline Co., 866 P.2d 1060 (Kan.), *cert. denied*, 115 S. Ct. 296 (1994)	6
Jackson Water Works, Inc. v. Public Utilities Comm'n, 793 F.2d 1090 (9th Cir.), *cert. denied*, 479 U.S. 1102 (1986)	12
Jimenez v. Weinberger, 417 U.S. 628, 636-38 (1974)	13
Kennecott Corp. v. Utah State Tax Comm'n, 858 P.2d 1381 (Utah 1993)	6
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973)	9
Mathews v. Lucas, 427 U.S. 495, 510 (1967)	9

Cases	Pages
Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)	9
Nordlinger v. Hahn, 120 L. Ed. 2d 1 (1992)	5,6,9,12
Northern Natural Gas Co. v. State Bd. of Equalization & Assessment, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990)	5,7,8
Rinaldi v. Yeager, 384 U.S. 305, 308 (1966)	13
Shapiro v. Thompson, 394 U.S. 618, 641 (1969), overruled in part on other grounds, *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)	7,12
Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923)	7
State v. Colonial Pipeline Co., 471 So. 2d 408 (Ala. Civ. App. 1984)	6
Western Air Lines, Inc. v. Board of Equalization, 480 U.S. 123,131 (1987)	7
Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981)	12
Williams v. Vermont, 472 U.S. 14 (1985)	9,13
Zobel v. Williams, 457 U.S. 55 (1982)	9

STATUTES

49 U.S.C. § 1513 (recodified at 49 U.S.C. § 04116 (1994)) 2,3,11

49 U.S.C. § 11503 (1988) 2,3

49 U.S.C. § 11503(b) 11

Okla. Const. art. X, § 8 14

Okla. Stat. Ann. tit. 68, § 2808 (West 1992) 2

Okla. Stat. Ann. tit. 68, § 2864(C) (West 1992) . . 2,3

U.S. Const. amend. XIV, § 1 2,9

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANR PIPELINE COMPANY and
COLORADO INTERSTATE GAS COMPANY,
Petitioners,

v.

THE STATE BOARD OF EQUALIZATION
and THE OKLAHOMA TAX COMMISSION,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

Petitioners ANR Pipeline Company and Colorado Interstate Gas Company hereby petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Oklahoma in this case.

OPINION BELOW

The Supreme Court of the State of Oklahoma assumed original jurisdiction in this case. That opinion is reported at 891 P.2d 1219 and is included in the Appendix beginning at p. A-1.

JURISDICTION

The decision of the Oklahoma Supreme Court was entered on December 20, 1994. Rehearing was denied on March 7,

1995. App. beginning at p. B-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (1988), is included in the Appendix beginning at p. C-1 .

The Tax Equity and Fiscal Responsibility Act, 49 U.S.C. § 1513 (recodified at 49 U.S.C. § 40116 (1994)), is included in the Appendix beginning at p. D -1.

The relevant section of the Oklahoma Ad Valorem Tax Code, Okla. Stat. Ann. tit. 68, § 2864(C) (West 1992), is included in the Appendix beginning at p. E-1 .

STATEMENT

A. Factual Background

Railroad carriers, air carriers and interstate natural gas pipelines are all interstate common carriers which transport goods for hire. Historically, the Oklahoma Ad Valorem Tax Code has classified railroad carriers, air carriers and natural gas pipelines as public service corporations and assessed all three in the same manner. Okla. Stat. Ann. tit. 68, § 2808 (West 1992). The Oklahoma Supreme Court recognized that all three have been similarly situated. App. at p. A-9 . Indeed, railroad carriers transport fuels, such as coal and propane, which compete with natural gas. Yet, for tax year 1994, pipeline property was assessed in Oklahoma at a ratio of 22.85% while railroad and

air carrier property was assessed at a ratio of only 12.08%. App. at p. A-7.

Congress has passed two acts which are designed to prevent tax discrimination against interstate common carriers. The Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (the "4-R Act"), prevents a state from taxing interstate railroad carriers more than that state taxes other commercial and industrial property. The Tax Equity and Reform Act, 49 U.S.C. § 1513 ("TEFRA"), prevents a state from taxing interstate air carriers more than that state taxes other commercial and industrial property. The 4-R Act and TEFRA both provide that certain discriminatory taxation acts against interstate common carriers "unreasonably burden and discriminate against interstate commerce."

In response to these two federal acts, the Oklahoma legislature passed the following statute:

> In determining the assessment ratio for all air carrier property and all railroad property, the State Board shall only consider the ratio of the aggregate assessed value of the fair cash value of the locally assessed commercial/industrial real property of the state.

Okla. Stat. Ann. tit. 68, § 2864(C). The Oklahoma Supreme Court's interpretation of this section was that it created a separate property tax classification for railroad carriers and air carriers, but not for pipelines. App. at p. A-9. As a result, railroad carriers and air carriers are to be spared from burdensome tax discrimination, but interstate pipelines are not.

B. Proceedings Below

Petitioners challenged in the Court of Tax Review their property tax assessments by the State Board of Equalization for tax year 1994, seeking to have their assessment ratios lowered to that ratio applied to railroad carriers and air carriers. Petitioners argued that the lower assessment ratios given to railroad

carriers and air carriers, but not given to pipelines, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Three public service companies brought a similar 1994 tax challenge before the Oklahoma Supreme Court on an Application to Assume Original Jurisdiction and Petition for Writ of Prohibition and Petitioners intervened. The Oklahoma Supreme Court assumed original jurisdiction and concluded that in response to the two federal acts, the Oklahoma legislature had created a separate subclass for railroad carriers and air carriers within the public service corporation tax classification. App. at. p. A-9. The state was permitted to give the lower assessment rate to railroad carriers and air carriers which was not given to other similarly situated public service corporations such as natural gas pipelines. The Writ of Prohibition was denied. App. at p. A-13.

The Oklahoma Supreme Court stated that because pipelines are "outside the protection afforded by Congress" that they are "no longer similarly situated to airlines and railroads." App. at p. A-9. The court held that the state legislature's compliance with the federal laws by creating a separate classification for railroad carriers and air carriers rationally furthered a legitimate state interest. App. at p. A-10. The Oklahoma court treated the federal anti-discrimination laws as a justification for tax discrimination against pipelines, resulting in its holding that there was no equal protection violation. App. at p. A-10. The Oklahoma court summarily concluded, without analysis of the elements of the applicable legal test and without citing to any supportive United States Supreme Court precedent, that a federal anti-discrimination statute can justify discriminatory treatment among otherwise similarly situated taxpayers even though the state could elect other methods of compliance which treat similarly situated taxpayers the same.

REASONS FOR GRANTING THE PETITION

The decision of the Oklahoma Supreme Court raises a significant question of federal law: Whether federal statutes designed to prevent tax discrimination can operate as an excuse under principles of the Equal Protection Clause for affirmative tax discrimination by a state. More particularly, may a state's voluntary election of one method of compliance with a federal statute permit a state to discriminate against similarly situated taxpayers even though the state could elect another method of compliance that treats similarly situated taxpayers the same?

In the instant case, the Oklahoma Supreme Court decision conflicts with both a decision of the Nebraska Supreme Court and with the decisions of this Court. The Oklahoma court's ruling conflicts with the Nebraska Supreme Court's ruling in *Northern Natural Gas Co. v. State Bd. of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990). The Nebraska court addressed the question of whether the 4-R Act justified discriminatory taxation among similarly situated taxpayers. The Nebraska court ruled that despite the federal statute, the Equal Protection Clause was violated when similarly situated taxpayers were not treated the same. In contrast, the Oklahoma Supreme Court held that because of the 4-R Act, railroad carriers and pipelines are no longer similarly situated. The Nebraska Court's decision is in compliance with both the 4-R Act and with the Equal Protection Clause. The Oklahoma Court's decision, however, complies with only the federal statutes, but not with the federal constitu-

---

[2] *In re ANR Pipeline Co.*, 866 P.2d 1060 (Kan.), *cert. denied*, 115 S. Ct. 296 (1994); *Kennecott Corp. v. Utah State Tax Comm'n*, 858 P.2d 1381 (Utah 1993); *Federal Express Corp. v. Tennessee State Bd. of Equalization*, 717 S.W.2d 873 (Tenn. 1986); *State v. Colonial Pipeline Co.*, 471 So. 2d 408 (Ala. Civ. App. 1984). To the extent that these cases held that the 4-R Act mandates separate tax classification, it appears they have been impliedly overruled by this Court's decision in *Department of Revenue of Oregon v. ACF Indus., Inc.*, which strictly construed the 4-R Act and limited its pre-emptive effect to its express language. 127 L. Ed 2d 165, 176 (1994).

tion. For this reason, the Oklahoma court's decision is worthy of this Court's review. A more detailed discussion of the state court conflict is set forth in Part I, *infra*.

The Oklahoma Supreme Court's ruling also conflicts with the Equal Protection principles outlined by this Court in *Nordlinger v. Hahn*, 120 L. Ed. 2d 1 (1992), and *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336 (1989). *Allegheny* holds that taxpayers placed in the same tax classification may not, under the Equal Protection Clause, be arbitrarily singled out for discriminatory treatment not imposed on others in the same tax classification. *Nordlinger* takes this principle further, providing that, regardless of whether the state has chosen to place taxpayers in the same classification or not, there must be a rationally based legitimate state interest for treating similarly situated taxpayers differently. Oklahoma's court ruled, without discussion of relevant precedent from this Court, that the federal anti-discrimination laws constituted such a rationally based legitimate state interest justifying discrimination against pipelines. In short, the 4-R Act and TEFRA, statutes designed to prevent tax discrimination, were treated by the Oklahoma court as permission to discriminate against some interstate common carriers while affording favorable tax treatment to other interstate common carriers. Thus, the Oklahoma decision conflicts with the Equal Protection principles set out by this Court and is worthy of review. A more detailed discussion of the conflict with this Court's decisions is set forth in Part II, *infra*.

Finally, this Court should consider this Petition because several states other than Oklahoma have rendered similar decisions interpreting the breadth of federal anti-discrimination statutes and have used such statutes as justification for discrimi-

---

[3] As a result of three federal district court decisions, the Nebraska tax officials were required under the 4-R Act to reduce the taxes of railroad property to match the levels of other commercial and industrial property.

natory state tax practices. The courts of Kansas, Utah, Tennessee and Alabama have all interpreted either TEFRA or the 4-R Act to permit burdensome taxation of public service corporations other than railroads and airlines.[2] Like other interstate common carriers, pipelines are "easy prey for State and local tax assessors in that they are nonvoting, often nonresident targets for local taxation, who cannot easily remove themselves from the locality." *Department of Revenue of Oregon v. ACF Indus., Inc.*, 127 L. Ed. 2d 165, 171 (1994)(citing *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987)). Hence, because such interpretation of the federal statutes runs afoul of the Equal Protection Clause and results in widespread tax discrimination by states, this Court should render a definitive ruling to guide the states as to the constitutionally permissible effect of such federal statutes.

I.

The Oklahoma court's decision is inconsistent with the Nebraska Supreme Court's holding in *Northern*. The *Northern* court held that even though the state taxing officials were "acting involuntarily and under compulsion of federal law," by taxing a pipeline differently from railroads, the state had denied "equal protection of the law contrary to the 14th amendment to the U.S. Constitution."[3] 443 N.W.2d at 255. In considering the cases interpreting the effect of the 4-R Act on Nebraska's property tax scheme, the Nebraska court did not find that the federal act created or was justification for creating separate tax classifications. Several pipelines had challenged the state tax commissioner's provision of favorable tax treatment to railroads. The Nebraska Supreme Court relied upon *Sioux City Bridge Co. v. Dakota County*. 260 U.S. 441 (1923), in holding that failure to treat the property of railroads and pipelines in the same manner violated the Equal Protection Clause. *Northern*, 443 N.W.2d at 256. This Court stated in *Sioux City*:

> The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, *whether occasioned by express terms of a statute* or by its improper execution through duly constituted agents.

260 U.S. at 445 (emphasis added). Therefore, even though the Oklahoma Legislature professed to be acting under compulsion of the federal laws, the discriminatory tax treatment still constituted an equal protection violation.

The Oklahoma court tried to distinguish *Northern* by explaining that Oklahoma "enjoys a different system of taxation" because the Oklahoma legislature has the power to establish different tax classes. App. at. p. A-11. This is a distinction without a legal difference. The Nebraska Constitution required that all tangible property, except for motor vehicles, was to be taxed uniformly. Thus, all pipeline and railroad tangible property was in the same tax class with most other tangible property. It makes no difference if the state constitution places tangible property in one tax class or if the state legislature places all public service corporation property in one tax class — either way pipelines are in the same tax class as railroad carriers and air carriers and are entitled to equal treatment. More importantly, and despite state designated classifications, interstate pipelines, railroad carriers and air carriers are similarly situated taxpayers. For example, interstate pipelines and railroad carriers transport competitive fuels in interstate commerce. Under the Equal Protection Clause they should be treated the same.

II.

The Equal Protection Clause of the United States Constitution provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. This Court stated the test under the Equal Protection Clause for constitutionality of tax classifications in *Nordlinger*. In order to pass constitutional muster, disparate tax treatment among similarly situated taxpayers must "rationally further a legitimate state interest" and cannot be "arbitrary or irrational." 120 L. Ed. 2d at 13. The Equal Protection Clause "does not forbid classifications, but simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike." *Id.* at 12 (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). The standard of review for challenges to state taxing regimes under the Equal Protection Clause is properly deferential and the states have "great leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). Deference, however, is not the same as abdication, and scrutiny under the "rationally based legitimate state interest" standard is still scrutiny. *Mathews v. Lucas*, 427 U.S. 495, 510 (1967)(rational basis standard is not toothless); *Nordlinger*, 120 L. Ed. 2d at 25-26 (Stevens, J., dissenting). This Court has on several occasions invalidated tax schemes under such a standard of review. *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982). When the "alikeness" of similarly situated taxpayers is reaffirmed by the state legislators placing them in the same tax classification, the constitutional directive to treat them the same is even stronger. *See, Allegheny Pittsburgh Coal Co.*, 488 U.S.

at 343-45; *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 28-30 (1931). The Oklahoma Supreme Court's conclusion cannot pass these well-established constitutional tests.

The court opined that the Oklahoma Legislature's "compliance" with the 4-R Act and TEFRA by enacting Section 2864(C) of the Oklahoma statues, which the court interpreted as creating a new tax sublclass, was enough of a rationally based legitimate state interest to avoid an Equal Protection Clause violation. Yet, the 4-R Act and TEFRA do not contain any language of classification. These acts do not attempt to tell the states how to classify or give direction on how to manage their property tax systems. These acts do not even tell the states how to tax railroad carriers and air carriers; these acts only prevent states from taxing railroad carriers and air carriers more than they tax commercial and industrial property. The 4-R Act provides in relevant part:

> The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value other commercial and industrial property has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
>
> (3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

49 U.S.C. § 11503(b). Similarly, TEFRA provides in relevant part:

> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State . . . may not do any of them:
>
> . . .
>
> (c) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

49 U.S.C. § 1513. The two federal acts serve as a guideline or measuring stick as to which taxing acts are discriminatory against interstate common carriers under the anti-discrimination principles of the federal Commerce Clause. *See, Department of Revenue of Oregon v. ACF Indus., Inc.*, 127 L. Ed. 2d 165, 173 (1994). Significantly, the federal Equal Protection Clause is founded in anti-discrimination principles paralleling those of the Commerce Clause. This basic premise that similarly situated taxpayers, such as interstate common carriers, should be treated the same is consistent with the philosophies of both the Equal Protection and Commerce Clauses, as well as the goals of the 4-R Act and TEFRA in preventing tax discrimination against interstate common carriers.

The Oklahoma Supreme Court's holding, however, is inconsistent with these anti-discrimination proclamations. The Oklahoma decision was rendered with knowledge that railroad carriers, air carriers and other commercial and industrial property owners' ad valorem taxes are to be assessed at a ratio of 12.08% of the property value while pipelines' ad valorem taxes are to be assessed at a ratio of 22.85% of the property value. The Oklahoma court recognized that under the rule of *Allegheny*, if the state legislature has left the pipelines within the same tax class as railroad carriers and air carriers, "the difference in the assessment percentages cannot withstand scrutiny under the

Equal Protection Clause." App. at p. A-8. . The Oklahoma court also admitted that absent the federal statutes, pipelines are similarly situated with railroads and air carriers. App. at. p. A-9. The only excuse, under the Oklahoma court's ruling, for separately classifying railroad carriers and air carriers from pipelines, and thereby imposing discriminatory taxes upon pipelines, is the existence of two federal anti-discrimination statutes. These federal statutes cannot be read in isolation from the broader U.S. Constitutional mandate that calls upon the states to comply with equal protection guarantees. "Congress may not authorize the States to violate the Equal Protection Clause." *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969), *overruled in part on other grounds*, *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). There is something intuitively wrong and patently illogical in an analysis which uses compliance with an anti-discrimination statute as the justification for discrimination, especially where other methods of compliance are available.

There are two distinct prongs to the *Nordlinger* test: first, the discriminatory treatment must further a *legitimate* state interest; and second, the classification must *rationally* relate to that legitimate state interest. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981); *Jackson Water Works, Inc. v. Public Utilities Comm'n*, 793 F.2d 1090 (9th Cir.), *cert. denied*, 479 U.S. 1102 (1986). The discriminatory treatment of pipelines in Oklahoma does not meet either prong of the test. There is no doubt that compliance with a federal statute is a legitimate state interest, however, such compliance must not at the same time violate the federal constitution.

The new subclass created in Oklahoma does not further an interest in compliance with federal law, it simply violates the Equal Protection Clause. If the state truly wished to further its interest in complying with the federal statutes, it could have chosen two other methods which do not violate the Equal Protection Clause. First, it could have lowered the assessment

ratio for interstate pipelines, along with railroad carriers and air carriers, to match that of commercial and industrial property. Second, it could have raised the assessment ratio for commercial and industrial property to match that of the interstate pipelines, railroad carriers and air carriers. The expressed interest is not furthered, however, by discrimination among similarly situated taxpayers. An interest which violates the United States Constitution can hardly be defined as "legitimate."

The only interest furthered by the separate classification of railroad carriers and air carriers is the state's interest in maintaining its tax discrimination against pipelines. The Oklahoma legislature has not in the past recognized any pre-existing differences among pipelines, railroad carriers and air carriers for ad valorem tax purposes. A classification must find justification outside itself; it must reflect pre-existing differences and cannot create new ones that are supported by only their own bootstraps. *Williams v. Vermont*, 472 U.S. at 27. The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966). Oklahoma must do more than arbitrarily create a separate class for railroad carriers and air carriers to deflect an equal protection challenge.

Also, the classification must rationally relate to the legitimate state interest by displaying some "fit" between the disparate treatment and the legislative purpose. Although the fit must not be made with mathematical precision, failure to include within a class those similarly situated may be so severe that it cannot be said that the legislative distinction "rationally furthers the posited state interest." *Jimenez v. Weinberger*, 417 U.S. 628, 636-38 (1974). The Oklahoma court failed to address how the expressed "compliance" is rationally related to a legitimate state interest when the state action taken was not even required by the federal laws. The federal laws only require that the state refrain from taxing railroad carriers and air carriers more than commer-

cial and industrial property; they do not require separate classification. They do not require continued discrimination against other interstate common carriers. Oklahoma's classification does not "fit" the stated goal of compliance with the 4-R Act and TEFRA.

Additionally, despite the Oklahoma Supreme Court's interpretation of it, even the plain language of Section 2864(C) does not compel separate classification. Like the 4-R Act and TEFRA, it simply directs the state to refrain from taxing railroad carriers and air carriers more than commercial and industrial property. The Oklahoma Constitution permits broad discretion in choosing assessment ratios, allowing a range of 0-35%. Okla. Const. art. X, § 8. The Oklahoma taxing officials could have complied with the 4-R Act, TEFRA and state law without creation of a tax subclass simply by ending discriminatory taxation against all similarly situated public service corporations and taxing all of them no more than the commercial and industrial property owners. The contrived explanation that the federal statutes required reclassification of railroad carriers and air carriers is not only inaccurate, it is also not rational to use anti-discrimination statutes as the foundation for discrimination.

Oklahoma's ill-conceived attempt at "compliance" with federal law defies logic, and is no more than an excuse for continued discrimination. It does not alter the fact that railroad carriers, air carriers and pipelines have all been placed in the same tax classification of public service corporations, and under *Allegheny Pittsburgh Coal Co.*, must be taxed uniformly. It is important that this Court review the effect of the 4-R Act and TEFRA on equal protection principles; the trend in Oklahoma and a few other states is to use these statutes as justification for singling out certain interstate common carriers to bear a vastly disproportionate tax burden.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

REBECCA H. NOECKER*
KAREN L. PAULEY
VIRGINIA G. AMEND
P.O. Box 1087
Colorado Springs, CO 80944
(719) 520-4767

Counsel for Petitioners

June 5, 1995

* Counsel of Record

Appendix A

No. 84,097

In the Supreme Court of the State of Oklahoma

WILLIAMS NATURAL GAS COMPANY,
WILLIAMS PIPE LINE COMPANY and
WILLIAMS TELECOM GROUP,

Petitioners,

v.

THE STATE BOARD OF EQUALIZATION
and THE OKLAHOMA TAX COMMISSION,

Respondents.

APPLICATION TO ASSUME ORIGINAL JURISDICTION
AND PETITION FOR WRIT OF PROHIBITION

Public service corporations filed original action to protest difference in ad valorem tax ratio applied to them and ratio applied to airlines and railroads.

Filed Dec. 20, 1994

**ORIGINAL JURISDICTION ASSUMED;
PETITION FOR WRIT OF PROHIBITION DENIED.**

Hall, Estill, Hardwick, Gable, Golden & Nelson
By: Graydon Dean Luthey, Jr.
and

For Petitioners

Kenneth L. Hunt Tulsa, Oklahoma and William G. von Glahn Associate General Counsel The Williams Companies Tulsa, Oklahoma	
Susan Brimer Loving Attorney General of Oklahoma and Douglas F. Price Assistant Attorney General Oklahoma City, Oklahoma	For Respondent State Board of Equalization
David Allen Miley Assistant General Counsel Oklahoma Tax Commission Oklahoma City, Oklahoma	For Respondent Oklahoma Tax Commission
Stipe Law Firm By: Gene Stipe and J. Rick Faling Oklahoma City, Oklahoma and Stuart Strasner Oklahoma City, Oklahoma	For Intervenors Oklahoma State School Board Association and Association of County Commissioners of Oklahoma

McKenzie, Moffett, Elias & Books By: William K. Elias Oklahoma City, Oklahoma	For Intervenors ANR Pipeline Company Colorado Interstate Gas Company El Paso Natural Gas Company Transwestern Pipeline Company Enron Oil & Gas Marketing Black Marlin Pipeline Company Explorer Pipeline Co. Aquila Gas Systems, Inc. Sun Pipeline Company Mid-Continent Pipe Line Company Northern Natural Gas Company Natural Gas Pipeline Company of North America Western Gas Resources, Inc.
Gable & Gotwals By: Oliver S. Howard and Teresa D. Adwan Tulsa, Oklahoma	Additional Counsel for Intervenors ANR Pipeline Company and Colorado Interstate Gas Company
Cleeta John Rogers General Counsel and Jon D. Sellers Oklahoma City Public Schools Oklahoma City, Oklahoma	For Intervenors Independent School District No. 89 of Oklahoma County, Oklahoma
Doerner, Stuart, Saunders, Daniel, Anderson & Biolchini By: John B. Turner and Rebecca M. Fowler Tulsa, Oklahoma	For Intervenor Public Service Company of Oklahoma

HODGES, C.J.

Three public service corporations, Williams Natural Gas Company, Williams Pipe Line Company, and Williams Telecom Group (Williams Companies) ask this Court to assume original jurisdiction. They request a writ prohibiting the State Board of Equalization (Board) from assessing their public service property at a greater ratio than that applied to public service property owned by railroads and airlines. Original jurisdiction is assumed and the petition for a writ of prohibition is denied.

The Williams Companies assert that the assessment of their property at a ratio higher than that used to assess railroad and airline property is unlawfully discriminatory. They have challenged the Board's assessment in the Court of Tax Review. There are seventy to ninety other challenges pending in that court. All were brought by public service corporations seeking to have their assessment ratio lowered to the ratio applied to railroad and airline companies.

The Board has responded through the Attorney General to the Williams Companies' application to this Court to assume original jurisdiction. The Oklahoma Tax Commission has adopted that response. Motions to intervene have been granted to the State School Board Association, the Association of County Commissioners, several pipeline companies with cases pending before the Court of Tax Review, the Oklahoma City Public Schools, and Public Service Company of Oklahoma. Oral arguments were heard on this matter on October 19, 1994.

ORIGINAL JURISDICTION

The Williams Companies, the Board, the School Board Association, and the Oklahoma City Schools ask this Court to assume original jurisdiction on the basis of *publici juris*. They point to the many other challenges pending in the Court of Tax Review which raise the issues presented by this original action. They urge resolution of the "pure questions of law" raised in this

action which must ultimately be determined by this Court. Further, they point out that if the matter is not resolved before April 1, 1995, when the ad valorem taxes are due, the taxes will be paid under protest. Those funds will then be placed in an escrow account and will be unavailable to schools and county governments.

Every recipient of ad valorem tax revenue is potentially impacted by this action. These include common schools (K-12), vocational technical education, county government, county health departments, emergency medical service districts, solid waste management districts, county and city/county libraries, and cities (sinking funds only). The projected revenue shortfall for these institutions is $63.8 million. This represents 6.8% of total property tax revenue.

This Court has assumed original jurisdiction pursuant to the doctrine of *publici juris* to address ad valorem tax issues emanating from the Board. *See State ex rel. Poulos v. State Bd. of Equalization*, 646 P.2d 1269 (1982); *State ex rel. Poulos v. State Bd. of Equalization*, 552 P.2d 1134 (1975). The public importance of the issues presented by this action are heightened by the adverse impact on school districts and county government if the controversy is not rapidly resolved. In addition, judicial economy will be served by today's resolution of the central issues in numerous ad valorem tax protests. Original jurisdiction is therefore assumed to address the issues raised by the Williams Companies.

BACKGROUND

In Oklahoma's Ad Valorem Tax Code, the Legislature has listed three classes of property: 1) real property; 2) personal property; and 3) public service corporation property. Okla. Stat. tit. 68, § 2803(A) (1991). Real and personal property are assessed locally by county officials. The Board, however, is "responsible for valuation of railroad, airline and public service

corporation property and the adjustment and equalization of all property values both centrally and locally assessed." *Id.* at § 2802(26). The Board assesses ad valorem taxes on public service corporations by 1) establishing a fair cash value for property and 2) fixing an assessment percentage for property. The second step is challenged in this action.

During the 1960s and 1970s, Congress became concerned about the number of failing railroads. *See Chrysler Rail Transp. Corp. v. Holt*, 845 F. Supp. 463, 465 (W.D. Mich. 1994). Congress found that the states had been forcing railroads to carry more than their share of the tax burden. To prevent discriminatory taxation of railroad property by the states, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), 49 U.S.C. § 11503 (1988). The Act provides in part:

> The following acts *unreasonably burden and discriminate against interstate commerce,* and a State, subdivision of a State, or authority acting for a State or subdivision may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value other commercial and industrial property has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
>
> (3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

Id. at § 11503(b)(emphasis added).

Tax discrimination against airline property which burdens interstate commerce was similarly remedied under provisions of

the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), 49 U.S.C. § 1513 (1988). That Act provides in part:

> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State . . . may not do any of them:
>
> . . . .
>
> (c) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

Id. at § 1513(d)(1)(c).

In response to these federal acts, the Oklahoma Legislature enacted section 2864(C) of title 68. That section provides that "[i]n determining the assessment ratio for all air carrier property and all railroad property, the State Board shall only consider the ratio of the aggregate assessed value of the fair cash value of the locally assessed commercial/industrial real property of the state."

In June of this year, the Board adopted an assessment ratio of 12.08% for airline and railroad property. In July, the Board adopted a ratio of 22.85% for the Williams Companies and other public service corporations.

The Williams Companies claim the assessments 1) violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, 2) violate article X, section 5 of the Oklahoma Constitution which requires uniform taxation within a tax class, and 3) violate sections 2803(C) and 2847 of the Ad Valorem Tax Code, Okla. Stat. tit. 68, §§ 2801-3152 (1991), which require uniform treatment in ad valorem taxation.

EQUAL PROTECTION

The Williams Companies assert that the Board's assessments violate the Equal Protection Clause of the Fourteenth

Amendment to the United States Constitution because their property subjects them to a higher assessment percentage than the assessment percentage applied to the property of airlines and railroads. Thus, they argue, their property has been subjected to discriminatory treatment. The Board responds that the Legislature has created a subclass of property for ad valorem taxation purposes of public service corporations, the railroad and airline companies, in response to the federal legislation.

The Equal Protection Clause of the Fourteenth Amendment requires that no state "deny to any person within its jurisdiction the equal protection of the laws." State legislatures are given "especially broad latitude in creating classifications and distinctions in tax statutes." *Regan v. Washington*, 461 U.S. 540, 547 (1983). Unless a classification "jeopardizes exercise of a fundamental right" or it "characterizes based upon an inherently suspect characteristic," the Equal Protection Clause requires only that the classification "rationally further a legitimate state interest." *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992) (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-441 (1985); *New Orleans v. Duke*, 427 U.S. 297, 303 (1976)). "This standard is especially deferential in the context of classifications made by complex tax laws." *Id.*

The present controversy, however, raises the threshold issue of whether a classification has occurred. If the Legislature has made railroads and airlines a subclass of public service corporations, that is permissible provided that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary." *Id.* If, on the other hand, the Legislature has left the Williams Companies and other public service corporations within the same tax class, the difference in the assessment percentages cannot withstand scrutiny under the Equal Protection Clause. *See, e.g., Allegheny Pittsburgh Coal Co. v. Webster County,* 488 U.S. 336, 345 (1989) ("The equal protection clause . . . protects the individual from state action

which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough v. Cromwell,* 326 U.S. 620, 623 (1946)).

The Williams Companies argue that the Legislature has not created a separate tax class or subclass for railroads and airlines because it did not amend section 2803. That section lists only three ad valorem tax classes. However, it is the intent of the Legislature to create a tax class that controls rather than the statutory format it chooses.

Section 2864(C) provides a different taxing method for a clearly defined subclass of public service corporations, the railroads and airlines. No longer are other public service corporations of the same class. They are outside the protection afforded by Congress and are no longer similarly situated to airlines and railroads. The fact that the Legislature chose to include the provision in section 2864 rather than section 2803 does not change that. Just as the Legislature made public service corporation property a subset of the larger set of commercial and industrial property, it made railroad and airline property a subset of public service corporation property.

The Legislature was required to recognize the supremacy of federal law. It responded by creating a subclass for railroads and airlines. This is not a situation where federal law has preempted a state statute due to a conflict. The Oklahoma Legislature responded to the federal act by amending the ad valorem tax scheme so that it would not conflict with federal law.

There is nothing arbitrary or irrational in that classification. It is limited to those protected by the federal acts. The Legislature's method of creating the class was consistent with the "large leeway" states are given "in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359 (1973).

The classification furthers a legitimate state interest. The Legislature enacted section 2864(C) to bring Oklahoma's ad valorem taxing scheme into compliance with federal laws which gave special protection to railroads and airlines. Compliance with federal law achieved by legislative creation of a tax subclass does not violate the Equal Protection Clause.

The parties have cited four state court decisions which have addressed equal protection and uniformity of taxation issues in this context. The Williams Companies rely upon *Northern Natural Gas Co. v. State Board of Equalization and Assessment*, 433 N.W. 2d 249 (Neb. 1989) cert. denied, 493 U.S. 1078 (1990). There, a pipeline company sought to have its property assessment equalized with railroads. On appeal from the State Board of Equalization and Assessment the Supreme Court of Nebraska found the decision denied equal protection to the pipeline company. It held:

> The State Board of Equalization and Assessment, by not taxing the personal property of certain property in a class, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied another taxpayer *in that same class* the equal protection of the law contrary to the 14th amendment to the Constitution of the United States.

Id. at 251 (Syllabus by the Court n.8)(emphasis added).

The key distinction between the facts of that case and the present one is that the Nebraska Board treated taxpayers of the same class differently. The Nebraska Constitution requires that "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property . . . ." Neb. Const. art. VIII, § 1. Essentially, the Nebraska taxing scheme treats *all* tangible property as being within the same class unless certain property, such as motor vehicles and agricultural land, has been exempted. Thus, when a federal court enjoined the state of Nebraska from

assessing the personal property of railroads, the result was that the assessments upon others within the class became disproportionately higher. 443 N.W.2d at 256.

When the Nebraska Supreme Court ordered that pipelines be given the same exemption as railroads, it created a revenue crisis. The Nebraska Legislature responded by making the personal property of railroads "a separate and distinct class of property and exempt[ed] the class from property taxation . . . . "*See* Neb. Rev. Stat. § 77.202.47 (4) (1990).

Oklahoma enjoys a different system of taxation. Our Constitution permits the Legislature to establish different tax classes in which property can be valued differently. *See* Okla. Const. art. X § 22. Airlines and railroads are in a legislatively created subclass of public service corporation property. This factual distinction brings this case under the persuasive authority of cases cited by the Oklahoma Board. *See In re ANR Pipeline Co.* 866 P.2d 1060 (Kan. 1994), *cert. denied*, 115 S. Ct. 296 (1994). *See also State v. Colonial Pipeline Co.*, 471 So. 2d 408 (Ala. Civ. App. 1984); *Federal Express Corp. v. Tennessee State Board of Equalization*, 717 S.W.2d 873 (Tenn. 1986). Those cases held that legislative tax classifications of railroads and airlines on one hand and other entities on the other hand, did not violate the Equal Protection Clause.

Specifically, the Kansas Supreme Court in *ANR* rejected a pipeline's request to have its real property assessed on the same basis as railroad property. In doing so, that court held that taxing railroad property differently from pipeline property did not violate either the Equal Protection Clause or the equal taxation provision of the Kansas Constitution.

The *ANR* court refused to follow the Nebraska decision noting that "[t]he Nebraska Constitution does not have property classifications." 866 P.2d at 1067. It observed that, unlike the Nebraska tax scheme, the Kansas Constitution "classifies all real and personal property and fixes the assessment rate for each

subclass." *Id.* at 1066. A 1992 amendment to the Kansas Constitution made railroad real property an exception to the public utility subclass to which it belonged. *Id.* at 1066-1067. The *ANR* court held that the challenged assessments did not violate the Kansas or United States Constitutions.

Oklahoma's tax scheme is similar to that of Kansas in that railroad property has been separately classified for different tax treatment. While the Kansas classification is found in its constitution, the Oklahoma classification is statutory pursuant to the express power to classify granted to the Oklahoma Legislature.

Finally, the Williams Companies' equal protection challenge to Oklahoma's Ad Valorem Tax Code constitutes an indirect attack on the validity of the 4-R Act and TEFRA. It should be noted that the constitutionality of the 4-R Act has been upheld in federal courts. *See Arizona v. Atchison T. & S.F.R.*, 656 F.2d 398 (9th Cir. 1981); *Louisville & N.R. v. Louisiana Tax Comm'n*, 498 F. Supp. 418, 421 (D.La. 1980); *Tennessee v. Louisville & N.R.*, 478 F. Supp. 199 (D. Tenn. 1979), *aff'd*, 652 F.2d 59 (2d Cir. 1981), *cert. denied*, 454 U.S. 834 (1981). No state or federal court has declared either the 4-R Act or TEFRA unconstitutional. Oklahoma's classification of railroads and airlines presents no equal protection violation.

OKLAHOMA CONSTITUTION

The Williams Companies next urge that the Board's assessments violate article X, section 5 of the Oklahoma Constitution. That section requires that "[t]axes be uniform upon the same class of subjects." However, because this Court has determined that a subclass of public service corporations was created by the Legislature, the applicable provision is section 22 of article X. It provides that "[n]othing in this Constitution shall be held, or construed, to prevent the classification of property for purposes of taxation; and the valuation of different classes by different means or methods." Railroads and airlines are a distinct subclass

of public service corporations whose property may, under the Oklahoma Constitution, be valued with a different assessment ratio.

OKLAHOMA'S AD VALOREM TAX CODE

The Williams Companies also argue that the Board's assessments violate sections 2803 (c) and 2847 of the Ad Valorem Tax Code. Section 2803 (c) requires that "[c]lassification as provided by this section shall require uniform treatment of each item within a class or any subclass as provided in Article X, Section 5 of the Oklahoma Constitution." Section 2847 requires in part that the assessment ratio "shall be selected by the State Board of Equalization and, subject to the requirements of federal law, uniformly applied to calculate the taxable values of public service corporation property within the state for the applicable assessment year."

These sections are statutory requirements of uniform ad valorem taxation within a class. Again, this case does not present an intra-class disparity of treatment. The airlines and railroads are within a legislatively created tax subclass. Therefore, no conflict with these sections is presented.

The Williams Companies have failed to demonstrate a violation of equal protection or ad valorem uniformity requirements. The Petition for Writ of Prohibition is denied.

ORIGINAL JURISDICTION ASSUMED; PETITION FOR WRIT OF PROHIBITION DENIED.

Concur: HODGES, C.J., SIMMS, HARGRAVE, SUMMERS, WATT, JJ.

Concur in Result: KAUGER, J.

Dissent: LAVENDER, V.C.J., OPALA, WILSON, JJ.

No. 84,097

In the Supreme Court of the State of Oklahoma

WILLIAMS NATURAL GAS COMPANY, WILLIAMS PIPE LINE COMPANY and WILLIAMS TELECOM GROUP,

Petitioners,

v.

THE STATE BOARD OF EQUALIZATION and THE OKLAHOMA TAX COMMISSION,

Respondents.

Filed Dec. 20, 1994

KAUGER, J. concurring in result:

Although the majority's discussion of equal protection rights has been centered upon the protection afforded by the United States Constitution and cases discussing its provisions, it has long been recognized that the due process clause found in art. 2, §7 of the Okla. Const.[1] has a definitional range which is coextensive with its federal counterpart. The United States Constitution and the Oklahoma Constitution each contain built-in anti-discrimination components which afford protection against unreasonable or unreasoned classifications which serve no important governmental interests.[2] The same equal protection component found in the fourteenth amendment of the United States Constitution is present in the due process clause of art. 2, §7.[3]

---

[1] The Okla. Const. art. 2, §7 provides:

> "No person shall be deprived of life, liberty, or property, without due process of law."

[2] *Fair School Finance Council v. State*, 746 P.2d 1135, 1148 (Okla. 1987).

[3] *Callaway v. City of Edmond*, 791 P.2d 104, 106 (Okla. 1990); *Fair School Finance Council v. State*, see note 2, *supra*; *McKeever Drilling Co. v. Egbert*, 170 Okla. 259, 40 P.2d 32, 35 (1935).

The Williams Companies are entitled to the privileges and guarantees found both in the United States and the Oklahoma Constitutions. Nevertheless, there is nothing arbitrary or irrational in the Legislature's classification providing a different taxing method for public service corporations, the railroads and airlines. The ad valorem tax scheme furthers a legitimate state interest aligning Oklahoma's tax laws with federal legislation. It does not violate the protections afforded by the Okla. Const. art. 2, §7. My conclusion that the Williams Companies have failed to demonstrate a violation of equal protection or ad valorem uniformity requirements is based on the Oklahoma Constitution which provides bona fide, separate, adequate and independent grounds upon which to rest the holding.[4]

---

[4] *Michigan v. Long*, 463 U.S. 1032, 1042, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214 (1983).

No. 84,097

In the Supreme Court of the State of Oklahoma

WILLIAMS NATURAL GAS COMPANY, WILLIAMS PIPE LINE COMPANY and WILLIAMS TELECOM GROUP,

Petitioners,

v.

THE STATE BOARD OF EQUALIZATION and THE OKLAHOMA TAX COMMISSION,

Respondents.

Filed Dec. 20, 1994

OPALA, J., with whom **LAVENDER, V.C.J.,** and **WILSON, J.,** join, dissenting.

The court holds today that the Legislature's compliance with certain federal statutes [1] – by creating a separate subclass of public service corporations[2] (comprised *only* of railroads and air carriers),[3] which *alone* qualify for a lower ad valorem assessment ratio than that afforded others (pipelines) in the same class of public service corporations—does not violate the Equal

---

[1] *See* 49 U.S.C. § 1513(d)(1) [Tax Equity and Fiscal Responsibility Act of 1982], *infra* note 17, and 49 U.S.C. § 11503(b) [Railroad Revitalization and Regulatory Reform Act of 1976], *infra* note 16.

[2] For a statutory definition of *public service corporation,* see 68 O.S.1991 § 2808, *infra* note 43. For another definition of the term, though in a different context, see Art. 9, § 34, Okl.Const.

[3] The terms of 68 O.S.1991 § 2864 (C) provide:

"In determining the assessment ratio for all *air carrier property* and all *railroad property,* the State Board shall only consider the

Protection Clause of the 14th Amendment, U.S. Const.[4] The court's rationale for sanctioning the disparity of treatment in the ad valorem tax scheme under scrutiny in this case rests on federal law preemption. The court assumes original cognizance and denies the petitioners' [pipelines'] quest to prohibit the State Board of Equalization [State Board] from subjecting their property to an assessment ratio greater than that applied to railroad and air carrier property.[5]

I must recede from the court's pronouncement. The dispositive first impression issue in this original proceeding is whether the federal-law mandate — that the states not discriminate against *railroads* and *air carriers* by assessing their property at a higher ratio than the assessed value of other "commercial and industrial property" — violates the anti-discrimination component of the 5th Amendment's Due Process Clause[6] by not affording the same protection to other *common carriers in interstate commerce*. If I were writing for the court today, I would (a) *hold* that the congressional acts[7] invoked by the State are fatally infirm for an impermissible underinclusion

---

ratio of the aggregate assessed value to the fair cash value of the locally assessed commercial/industrial real property of the state." (Emphasis added.)

[4] The Equal Protection Clause of the 14th Amend., § 1, U.S. Const., commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Nordlinger v. Hahn, 505 U.S. __, 112 S. Ct. 2326, 2331 n.1, 120 L.Ed.2d 1 (1992).

[5] An assessment ratio of 12.08 percent (12.08%) for public service corporation property owned by air carriers was adopted by the State Board on June 20, 1994. Then, on July 15, 1994 a 22.85 percent (22.85%) assessment ratio was ratified for property owned by the petitioners (pipelines). Taxes calculated under these ratios will be due after April 1, 1995.

[6] The pertinent terms of the 5th Amend., U.S. Const., are:

" . . . nor [shall any person] be deprived of life, liberty, *or property*, without due process of law . . ." (Emphasis added.)

[7] Railroad Revitalization and Regulatory Reform Act of 1976, *infra* note 16, and Tax Equity and Fiscal Responsibility Act of 1982, *infra* note 17.

in the preferred class of *other common carriers in interstate commerce,* (b) *conclude* that the infirm federal acts have no preemptive effect on state law,[8] (c) *examine* the contested state tax laws for conformity to state fundamental-law equality[9] and uniformity[10] standards, (d) *direct* that, upon due notice and hearings, the State Board set an across-the-board assessment ratio that would apply *alike to all* public service corporations, and (e) *enjoin* that, on the State Board's failure to do so within some reasonable period of time to be set by the court, the petitioners could discharge their ad valorem tax liability at the assessment ratio *now* applicable *solely* to railroads and air carriers. Because the solution I advance represents a sharp break with recent practice, I would (a) give prospective effect to the court's pronouncement and make it apply to this case, to like challenges presently pending before the Court of Tax Review or before any administrative agency and to those challenges that are now in the appellate litigation process, (b) expressly reject any refund claims to be pressed by the affected entities for overpayment of taxes assessed at the impermissible ratio for any past years[11] and (c) postpone the effective date of the new assessment ratio required by my analysis until the fiscal year beginning July 1, 1996.

---

[8] For a discussion of the federal acts' nonpreemptive effect, see Part IX, *infra*.

[9] Art. 10, § 22, Okl.Const., *infra* note 39.

[10] Art. 10, § 5, Okl.Const., *infra* note 38.

[11] For a discussion of the prospective effect I would give to my solution, see Part IX, *infra*.

I

UNDER THE FEDERAL OUSTER-OF-JURISDICTION DOCTRINE, THIS COURT IS NOT DIVESTED OF ITS *INHERENT* AUTHORITY TO TEST THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976 AND THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982 FOR THEIR CONFORMITY TO THE MANDATORY STANDARDS OF THE U.S. CONSTITUTION

State courts have *inherent* authority and are presumptively competent to adjudicate claims arising under the laws of the United States.[12] To exclude state courts from this adjudicative

---

[12] McKesson v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 48, 110 S.Ct. 2238, 2246 n.10, 110 L.Ed.2d 17 (1990); Yellow Freights, Inc. v. Donnelly, 494 U.S. 820, 823, 110 S.Ct. 1566, 1568, 108 L.Ed.2d 834 (1990); Tafflin v. Levitt, 493 U.S. 455, 458-459, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-478, 101 S.Ct. 2870, 2875, 69 L.Ed.2d 784 (1981); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-508, 82 S.Ct. 519, 522-523, 7 L.Ed.2d 483 (1962); Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 517, 18 S.Ct. 685, 688, 42 L.Ed. 1126 (1898); Chaflin v. Houseman, 93 U.S. 130, 136, 23 L.Ed. 833, 838 (1876); Houston v. Moore, 18 U.S. (5 Wheat.) 1, 25-26, 5 L.Ed. 19 (1820). The Court stated in Howlett By and Through Howlett v. Rose, 496 U.S. 356, 367, 110 S.Ct. 2430, 2438, 110 L.Ed.2d 332 (1990):

> "Federal law is enforceble in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum . . . but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure."

Testa v. Katt, 330 U.S. 386, 393, 67 S.Ct. 810, 814, 91 L.Ed. 967 (1947), teaches that the Supremacy Clause compels a state court to exercise jurisdic-

arena, Congress must *affirmatively divest (or oust)* them of their presumptively *concurrent jurisdiction.*[13] Congressional state-court ouster may be effected by (1) an explicit statutory directive, (2) *unmistakable* implication from legislative history, or (3) a *clear incompatibility* between state-court jurisdiction and federal interests. [14] *None of these indicia of ouster is present in the federal legislation we are called upon to consider in this case.*

Because my examination of the congressional acts, their legislative history and attendant jurisprudence reveals no federal ouster of state-court cognizance, I would proceed to test their validity under the applicable standards of the U.S. Constitution and hold them *fatally infirm* for the reasons stated in Parts IV, VI and VIII, *infra.*

---

tion over a federal-law claim because *"the policy of the federal Act is the prevailing policy in every state."* (Emphasis supplied.) Any other result, the Court notes, "flies in the face of the fact that the States of the Union constitute a nation." *Id.,* 330 U.S. at 389, 67 S.Ct. at 812.

[13] *Howlett, supra* note 12, 496 U.S. at 368 n.15, 110 S.Ct. at 2438; *Yellow Freight, supra* note 12, 494 U.S. at 823, 110 S.Ct. at 1568; *Tafflin, supra* note 12, 493 U.S. at 459, 110 S.Ct. at 795. *See in this connection McKesson, supra* note 12, 496 U.S. at 48 n.10, 110 S.Ct. at 2246 ("'[I]n every case in which [state courts] were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth .... [T]he inference seems to be conclusive that the *state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited*'"). *Id.* (quoting from The Federalist No. 82 at 555 (A.Hamilton) (J.Cook ed. 1961) (emphasis added).

[14] *Tafflin,* supra note 12, 493 U.S. at 459, 110 S.Ct. at 795; *Chaflin, supra* note 12, 93 U.S. at 136; *Houston, supra* note 12, 5 U.S. at 68; *Gulf Offshore, supra* note 12, 453, U.S. at 478, 101 S.Ct. at 2875.

II

THIS COURT IS NOT OFFENDING AGAINST THE ADVERSARY FORMAT OF THE PROCEEDINGS WHEN IT USES ITS OWN REASONING IN ADDRESSING THE PROPOSITIONS VIGOROUSLY ADVANCED BY THE PETITIONERS

Whenever in an original proceeding the petitioner vigorously and articulately urges a fully briefed legal proposition, this court is free to supply its own analysis and reasoning in addressing the petitioner's argument for the relief sought.[15]

Even though the petitioners argued that the assessment ratio affecting their property is violative of the state and federal fundamental law, they did not *expressly* call for constitutional condemnation of the two *federal acts* under consideration. Their failure vigorously to press that point in support of the proposition urged does not preclude this court from applying *sua sponte* the analysis I counsel today, which favors granting the relief petitioners seek by this original action.

III

THE FEDERAL AND STATE STATUTORY SCHEME

To revitalize the struggling railroad industry and to provide for "tax equity" in general, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 [4-R Act][16] and the Tax Equity and Fiscal Responsibility Act of 1982

---

[15] California v. Rooney, 483 U.S. 307, 311, 107 S.Ct. 2852, 2854, 97 L.Ed.2d 258 (1987), *reh. denied,* 483 U.S. 1056, 108 S.Ct. 30, 97 L.Ed.2d 819 (1987); Black v. Cutter Laboratories, 351 U.S. 292, 297, 76 S.Ct. 824, 827, 100 L.Ed. 1188 (1956), *reh. denied,* 352 U.S. 859, 77 S.Ct. 21, 1 L.Ed.2d 69 (1956); *see also* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed. 2d 694 (1984), *reh. denied,* 468 U.S. 1227, 105 S.Ct. 28, 82 L.Ed.2d 921 (1984); Williams v. Norris, 25 U.S. (12 Wheat.) 117, 120, 6 L.Ed. 571 (1827).

[16] The terms of 49 U.S.C. § 11503 (b) [4-R Act] provide in pertinent part:

[TEFRA].[17] Among other things, these two acts prohibit the states from assessing railroad and air carrier property at a level that has a higher ratio to true market worth than that borne by the assessed value of other "commercial and industrial property" in the same assessment jurisdiction. The petitioners, who as pipelines *also engage in interstate commerce, are not similarly shielded by the Congress from a higher state assessment ratio.*

"The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a *State or subdivision of a State may not* do any of them:

(1) *assess rail transportation property at a value that has a higher ratio* to the true market value of the rail transportation property *than the ratio that the assessed value of other commercial and industrial property* in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction. * * *" (Emphasis added.)

[17] The pertinent terms of 49 U.S.C. § 1513(d)(1) [TEFRA] are:

"(d) Acts which unreasonably burden and discriminate against interstate commerce; definitions

"(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) *assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;* * * * " (Emphasis added.)

Responding to the federal-law mandate, the Legislature created a subclass of railroad and air carrier property[18] and established for that category an assessment methodology which is *different* from that imposed upon the property of other public service corporations.[19] Section 2864(C) of the Ad Valorem Tax Code provides that in determining the assessment ratio for "all air carrier . . . and railroad property, the State Board shall only consider the ratio of the aggregate assessed value of the fair cash value to the locally assessed commercial/industrial real property of the state."[20] *No other public service corporations are afforded the same benefit. Based on the statutory scheme, the State Board adopted in 1994 an assessment ratio of 12.08% for air carrier and railroad property and 22. 85% for the petitioners.*[21]

The petitioners seek relief from the State Board's action in assessing their property at a ratio much higher than that applied to public service corporation property of air carriers and railroads. They urge the State Board's dissimilar treatment of members of the same class violates the 14th Amendment guarantee of equal protection[22] as well as the uniformity of taxation mandate in the state fundamental law.[23] The State Board asserts

---

[18] *See* 68 O.S.1991 § 2864 (C), *supra* note 3; *see also* the terms of 68 O.S.1991 § 2803 (A), which provide:

> "A. The Legislature, pursuant to authority of Article X, Section 22 of the Oklahoma Constitution, hereby classifies the following types of property for purposes of ad valorem taxation:
>
> 1. Real property;
>
> 2. Personal property; and
>
> 3. Public service corporation property."

[19] For a statutory definition of *public service corporation,* see 68 O.S. 1991 § 2808, *infra* note 43.

[20] For the terms of 68 O.S.1991 § 2864(C), see *supra* note 3.

[21] *See supra* note 5.

[22] For the terms of the Equal Protection Clause of the 14th Amend., U.S. Const., see *supra* note 4.

[23] Art. 10, § 5, Okl.Const., *infra* note 38.

that its assessment ratios are based on the Legislature's legitimate response to the mandate of the two federal statutes invoked.

IV

MEASURED BY THE ANTI-DISCRIMINATION COMPONENT OF THE 5TH AMENDMENT'S DUE PROCESS CLAUSE, THE TWO FEDERAL STATUTES UNDER CONSIDERATION CREATE AN IMPERMISSIBLE SUBCLASS OF *COMMON CARRIERS IN INTERSTATE COMMERCE* WHICH IS VOID FOR UNDERINCLUSIVENESS

The equal protection command of the U.S. Constitution has one clear and central meaning — *it absolutely prohibits invidious governmental discrimination*. That standard, which, under the Equal Protection Clause of the 14th Amendment, [24] has to be met by *every state must also be obeyed by the federal government* under the command of the Due Process Clause in the 5th Amendment.[25] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[26]

---

[24] *Nordlinger, supra* note 4, 505 U.S. at ___, 112 S.Ct. at 2331; Loving v. Virginia, 388 U.S. 1, 10, 87 S.Ct. 1817, 1822, 18 L.Ed.2d 1010 (1967); Hill v. Texas, 316 U.S. 400, 405, 62 S.Ct. 1159, 1162, 86 L.Ed. 1559 (1942).

[25] Although there is no equal protection clause in the 5th Amendment, the Court recognizes in its provisions the presence of an element of equal treatment under the law, which "stem[s] from our American ideal of fairness." Bolling v. Sharpe, 347 U.S. 497, 500, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954); *see also* Washington v. Davis, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2, 95 S.Ct. 1225, 1228, 43 L.Ed.2d 514 (1975); Davis v. Passman, 442 U.S. 228, 234, 99 S.Ct. 2264, 2271, 60 L.Ed.2d 846 (1979). The equal protection component of the 5th Amendment forbids discrimination that is "so unjustifiable as to be violative of due process." *Bolling, supra,* 347 U.S. at 499, 74 S.Ct. at 694.

[26] Buckley v. Valeo, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976).

Section 5 of the 14th Amendment[27] empowers Congress to enact legislation implementing the commands of that amendment. While the 14th Amendment's enforcement clause is a positive grant of power authorizing Congress to exercise its discretion in determining what statute is needed to shield equal protection guarantees, the 5th Amendment *prohibits that federal law-making body from assaulting those guarantees by the very legislation that is meant to secure them.* [28]

Economic legislation — like that in the two acts tendered for our consideration today — "that does not employ suspect classifications or impinge on judgmental rights must [generally] be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose."[29] State legislation imposing a tax on one individual but

---

[27] Section 5 of the 14th Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article." *See* Katzenback v. Morgan, 384 U.S. 641, 648-650, 86 S.Ct. 1717, 1722-1723, 16 L.Ed.2d 828 (1966), where the Court upheld Congress' statutory prohibition of state-imposed literacy tests because of their discriminatory effect upon illiterate minorities. There, the *Court subordinated its own contrary jurisprudence to the § 5 implementing legislation.*

[28] Shapiro v. Thompson, 394 U.S. 618, 630, 89 S.Ct.1322, 22 L.Ed.2d 600 (1969) (*overruled in part on other grounds,* Edelman v. Jordan, 415 U.S. 651, 671, 94 S.Ct. 1347, 1359-1360, 39 L.Ed.2d 662 (1974)); Graham v. Richardson, 403 U.S. 365, 382, 91 S.Ct. 1848, 1857, 29 L.Ed.2d 534 (1971); Mississippi University for Women v. Hogan, 458 U.S. 718, 732-733, 102 S.Ct. 3331, 3340, 73 L.Ed.2d 1090 (1982)(citing *Katzenback, supra* note 27); Williams v. Rhodes, 393 U.S. 23, 29, 89 S.Ct. 5, 9-10, 21 L.Ed.2d 24 (1968).

[29] Hodel v. Indiana, 452 U.S. 314, 331, 101 S.Ct. 2376, 2387, 69 L.Ed.2d 40 (1981); Schweiker v. Wilson, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981); Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 668, 101 S.Ct. 2070, 2083, 68 L.Ed.2d 514 (1981); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461-463, 101 S.Ct. 715, 722-723, 66 L.Ed.2d 659 (1981) *reh. denied* 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-79, 101 S.Ct. 453, 459-61, 66 L.Ed.2d 368 (1980) *reh. denied* 450 U.S. 960, 101 S.Ct. 1421, 67 L.Ed.2d. 385 (1981); Kotch v. Board of River Pilot Commr's, 330 U.S. 552, 564, 67 S.Ct. 910, 916, 91 L.Ed.

not on others of the same class *may*, on the other hand, violate the Equal Protection Clause.[30] Federal economic legislation which has a discriminatory tax impact on class members *may similarly infringe* on due process rights. Whether Congress' mandate for nondiscriminatory state tax treatment of railroads and air carriers was passed in the exercise of its powers under the Commerce Clause or under the enforcement provisions in § 5 of the 14th Amendment, it is clear that the two federal statutes result in disparate treatment of pipelines, which, though falling within the congressionally established class of *common carriers in interstate commerce*, are denied the same shield against excessive state tax assessment ratios.[31] In sum, pipelines have been *excluded* by Congress from the *subclass* of favored common carriers who alone enjoy the palladium against burdensome taxation.[32]

1093 (1947) *reh.denied* 331 U.S. 864, 67 S.Ct. 1196, 91 L.Ed. 1869 (1947); Regan v. Taxation with Representation of Washington, 461 U.S. 540, 547, 103 S.Ct. 1997, 2001-2002, 76 L.Ed.2d 129 (1983); Exxon Corporation v. Eagerton, 462 U.S. 176, 195, 103 S.Ct. 2296, 2308, 76 L.Ed.2d 497 (1983); Eaton v. Jarvis Products Corp., 965 F.2d 922, 929 (10th Cir. 1992).

[30] Hillsborough Tp. v. Cromwell, 326 U.S. 620, 623, 66 S.Ct. 445, 448, 90 L.Ed. 358, 363 (1946); *cf.* City of New Orleans v. Dukes, 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2516-2517, 49 L.Ed.2d 511 (1976) (states are given greater latitude in implementing purely economic regulations challenged as violative of the Equal Protection Clause of the 14th Amendment).

[31] The Interstate Commerce Act, 49 U.S.C. §§ 10101 (1988) *et seq.*, governs, among other things, all common and air carriers (if the latter are not statutorily included within the definition of common carrier) in interstate commerce. The terms of 49 U.S.C. § 10102 (4) define a *common carrier* as "an express career, *a pipeline carrier, a rail carrier,* a sleeping car carrier, a motor common carrier, a water common carrier, and a household goods freight forwarder." (Emphasis added.) Though there may be some doubt whether federal legislation includes air carriers under the heading of common carrier, I refer to the term *common carrier* as all-inclusive.

[32] *See* Appeal of ANR Pipeline Co., 254 Kan. 534, 543, 866 P.2d 1060, 1066-1067 (1994), *cert. denied*, __U.S.__, 115 S.Ct. 296, __L.Ed.2d__ (1994), where the court notes: "The brief of the [Kansas] Department of

When Congress singles out some members of a class for a benefit not given to others in the same class and no rational relation can be shown for the disparate treatment, an impermissible underinclusive class[33] is created which denies the excluded members equal treatment under the law. Legislative history, interpretive case law and the text of the two statutes demonstrate no rational relationship between the disparity created and some legitimate government aim to be achieved.[34] Congress, while favoring some common carriers, plainly omitted pipelines from the protective shield afforded by the two acts. When measured against the anti-discrimination component of the 5th Amendment, the two federal statutes in question are void for underinclusiveness. *I would so hold.*

The Supremacy Clause[35] mandates preemption of state regulation by discordant national legislation that is conformable to the U.S. Constitution.[36] Federal statutory law that would require this court to violate the equal-treatment command of the U.S. Constitution need not be obeyed as valid legislation.[37]

Revenue states *pipeline companies attempted unsuccessfully to obtain like federal legislation in their favor.* The statement is not disputed." (Emphasis added).

[33] For a discussion of impermissible under inclusive classifications, see Orr v. Orr, 440 U.S. 268, 272, 99 S.Ct. 1102, 1108, 59 L.Ed.2d 306 (1979); Stanton v. Stanton, 421 U.S. 7, 13-14, 95 S.Ct. 1373, 1377, 43 L.Ed.2d 688 (1975).

[34] Clements v. Fashing, 457 U.S. 957, 964, 102 S.Ct. 2836, 2844, 73 L.Ed.2d 508 (1982).

[35] Art. 6, cl. 2, U.S. Const., states in pertinent part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuant thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, ... "

[36] Pac. Gas & Elc. v. St. Energy Resources Conserv., 461 U.S. 190, 203-204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983).

[37] *Shapiro, supra* note 28, 394 U.S. at 630, 89 S.Ct at 1325; *Graham. supra* note 28, 403 U.S. at 382, 91 S.Ct at 1857.

V

ABSENT PREEMPTIVE FEDERAL LEGISLATION THAT IS FREE FROM CONSTITUTIONAL INFIRMITY, ART. 10, § 5, OKL.CONST.,[38] *COMMANDS* THE INCLUSION OF ALL PUBLIC SERVICE CORPORATIONS IN THE SAME TAX CLASSIFICATION

The State Constitution authorizes the Legislature to classify property for ad valorem taxation[39] and requires the State Board to assess uniformly all public service corporation property.[40] The Legislature has divided property that is subject to ad valorem tax into three classes — real, personal and public service corporation property[41] — and has then carved out of the latter class a subclass embracing *only* railroad and air carrier property.[42] For ad valorem taxation purposes, railroads, air

---

[38] The terms of Art. 10, § 5, Okl.Const., are:

"The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform *upon the same class of subjects.*" (Emphasis added.)

[39] The terms of Art. 10, § 22, Okl.Const., are:

"Nothing in this Constitution shall be held, or construed, to prevent the classification of property for purposes of taxation; and the valuation of *different* classes by different means or methods. (Emphasis added.)

[40] Art. 10, § 5, Okl.Const., *supra* note 38. The terms of Art. 10, § 21, Okl.Const., are:

"A. There shall be a State Board of Equalization consisting of the Governor, State Auditor, State Treasurer, Lieutenant Governor, Attorney General, State Inspector and Examiner and President of the Board of Agriculture. The duty of said Board shall be to adjust and equalize the valuation of real and personal property of the several counties in the state . . . and they shall assess all railroad and public service corporation property. * * *".

[41] 68 O.S.1991 § 2803(A), *supra* note 18.

carriers *and pipeline companies* are all integral members of the same taxpayer category.[43] *They must hence be treated alike.*

Because I believe the federal legislation in question is constitutionally infirm, I would require that the State Board *comply with our own fundamental law mandating uniform assessment ratio for all entities within the same class.*

VI

CONGRESS MAY NOT AUTHORIZE THE STATES TO VIOLATE THE EQUAL PROTECTION CLAUSE

Assuming that the two federal acts *are not infirm* when tested for conformity to the 5th Amendment's anti-discrimination component, they must *nonetheless* be condemned as impermissible congressional commands to the states. This is so because both statutes clearly call for an unmistakable violation of the 14th Amendment's Equal Protection Clause.[44] The U.S. Supreme Court's jurisprudence inexorably commands the states to establish and follow an ad valorem tax regime that is not offensive to equal protection.[45] Federal *legislation*, on the other

---

[42] 68 O.S.1991 § 2864(C), *supra* note 3.

[43] The terms of 68 O.S.1991 § 2808 provide in pertinent part:

> "A. The term public service corporation, as, used in the Ad Valorem Tax Code, shall include . . . all persons authorized . . . to use or occupy any right-of-way, street, alley, or public highway, along, over or under the same in a manner not permitted to the general public."

See Pure Oil Pipe Line Co. v. Cornish, 163 Okl. 79, 20 P.2d 1041, 1043-44 (1933).

[44] For the terms of the Equal Protection Clause of the 14th Amend., U.S. Const., see *supra* note 4; *Nordlinger, supra* note 4, 505 U.S. at __, 112 S.Ct. at 2331.

[45] Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 344, 109 S.Ct. 633, 638, 102 L.Ed.2d 688 (1989); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351

hand, requires that railroads and air carriers *not* be assessed at a higher ratio than that prescribed for commercial property.[46] The latter acts cannot be read in isolation from the *broader* U.S. constitutional mandate that calls upon the states to comply with equal protection guarantees.[47] Congress' statutory command that the states give air carriers and railroads preferential tax treatment plainly places the states' assessment regimes in contravention of the U.S. Supreme Court's equal protection jurisprudence. This is so because no rational basis exists for denying pipelines (and other similarly situated landowners) the palladium afforded by the constitutional requirement for an assessment regime that would pass equal protection muster.[48]

"Congress may not authorize the States to violate the Equal Protection Clause."[49] Although "deference [must be given] to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."[50] The powers granted by the

---

(1973) *reh. denied* 411 U.S. 910, 93 S.Ct. 1523, 36 L.Ed.2d 200 (1973). *Hillsborough, supra note 30*, teaches that "[t]he equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment." *Id.*, 326 U.S. at 623, 66 S.Ct. at 448. "[A] taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others." Southern Railway Co. v. Watts, 260 U.S. 519, 526, 43 S.Ct. 192, 195, 67 L.Ed. 375 (1923).

[46] *See* 4-R Act, *supra* note 16; TEFRA, *supra* note 17.

[47] For the terms of the Equal Protection Clause of the 14th Amend., § 1, U.S.Const., see *supra* note 4; *see also Nordlinger, supra* note 4, 505 U.S. at __, 112 S.Ct. at 2331.

[48] Different treatment of similarly situated taxpayers does not violate equal protection so long as rational basis exists for the disparity of treatment. *Lehnhausen, supra* note 45, 410 U.S. at 359, 93 S.Ct. at 1003.

[49] *Shapiro, supra* note 28, 394 U.S. at 618, 89 S.Ct. at 1325; *Graham, supra* note 28, 403 U.S. at 382, 91 S.Ct. at 1857.

U.S. Constitution to the Congress or to the states "are always subject to the limitation that they may not be exercised in a way that violate[s] other specific provisions of the Constitution."[51]

The court today notes that the 4-R Act has been upheld by some federal courts[52] and that no state or federal court has ever declared either that act or TEFRA unconstitutional.[53] *The cases cited in the court's opinion are not persuasive as a legal barrier to the court's recognition of the constitutional flaw to which I allude.* In one of the cases, *Tennessee v. Louisville,*[54] the federal court applied a two-part test for determining the constitutionality of federal legislation *under the Commerce Clause*: such legislation, the court said, (1) must bear a rational nexus to an activity that affects interstate commerce; and (2) if Congress finds such a basis, it must select a reasonable and appropriate means of eliminating the detrimental effect the offending activity would exert on interstate commerce. None of these cases addressed the issue whether the federal legislation under our scrutiny today would pass constitutional muster either under the rational-basis test of the 5th Amendment's anti-discrimination component or under the 14th Amendment's Equal Protection Clause. In the

---

[50] *Mississippi University, supra* note 28, 458 U.S. at 732-733, 102 S.Ct. at 3340 (citing *Katzenbach, supra* note 27).

[51] *Rhodes, supra* note 28, 393 U.S. at 29, 89 S.Ct. at 9-10.

[52] *See* State of Arizona v. Atchison, Topeka and Santa Fe RR Co., 656 F.2d 398, 405 (9th Cir. 1981); Louisville & Nashville RR Co. v. Louisiana Tax Comm'n, 498 F.Supp. 418, 422 (1980); Tennessee v. Louisville & Nashville RR Co., 478 F.Supp. 199, 206-207 (M.D.Tenn. 1979), *aff'd,* 652 F.2d 59 (6th Cir. 1981), *cert. denied,* 454 U.S. 834, 102 S.Ct. 135, 70 L.Ed.2d 114 (1981).

[53] My research reveals no federal TEFRA jurisprudence which addresses the constitutional validity of the Act against an attack based on the 5th Amendment's anti-discrimination component. In Salem Transp. Co. v. Port Authority of N.Y. & N.J., 611 F.Supp. 254, 258 (S.D.N.Y. 1985), the court held that a gross receipts fee levied by a market-participant local

absence of a binding Supreme Court precedent,[55] on substantive federal-law questions we follow, as a matter of *pure comity*, the Tenth Circuit pronouncements, and on issues affecting state action we defer to that court's constitutional jurisprudence.[56] *Because neither the U.S. Court of Appeals for the Tenth Circuit nor the highest federal Court ever has passed upon the issue before us here,*[57] *we need not today give deference to any extant federal case law.* In the exercise of its *inherent* authority under the U.S. Constitution, this court is competent to test the two federal statutes for constitutional orthodoxy.

VII

THE CONGRESSIONAL COMMERCE-CLAUSE POWERS DO NOT LEND SUPPORT TO THE VALIDITY OF THE TWO FEDERAL ACTS

Bacchus Imports, Ltd. v. Dias[58] struck down as violative of the Commerce Clause[59] a state excise tax which discriminated against interstate commerce by bestowing a commercial

---

government entity violates neither the provisions of TEFRA nor Commerce Clause principles.

[54] *Tennessee, supra* note 52 at 206-207.

[55] No extant U.S. Supreme Court jurisprudence has addressed the constitutional validity of the federal law under scrutiny here (49 U.S.C.A. §§ 1513(d)(1)(A), l l503(b)(1)). In Dept. of Revenue of Or. v. ACF Industries, __ U.S. __, 114 S.Ct. 843, 849, 127 L.Ed.2d 165 (1994), a recent case construing the 4-R Act, the Court merely held the act's definition of "commercial and industrial property" *excludes* property exempted under applicable law.

[56] Phillips v. Williams, Okl., 608 P.2d 1131, 1135 (1980); McLin v. Trimble, Okl., 795 P.2d 1035, 1047 (1990)(0pala, J., dissenting).

[57] In Atchison, T. & S. F. Ry. Co. v. Lennen, 640 F.2d 255, 258-259 (l0th Cir. 1981), the court interpreted the 4-R Act to authorize injunctive relief to facilitate the Act's enforcement, *but had before it no issues of a constitutional dimension.*

[58] 468 U.S. 263, 272-273, 104 S.Ct. 3049, 3055-3056, 82 L.Ed.2d. 200 (1984).

advantage (excise tax exemption) on sales of wine and liquor made from local products while imposing a 20% excise tax on foreign liquor. The Court held that the states may not build up their domestic commerce by means of unequal and oppressive burdens placed upon the industry and business of other states. *Bacchus* teaches that *state economic protectionism cannot be rested on the legislative "characterization of an industry as either 'thriving' or 'struggling'".*[60]

The 4-R Act's purpose, stated in the congressional declaration of policy, is "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States."[61] TEFRA's objective is "to provide for tax equity and financial responsibility."[62] Congress' solution to these goals was (a) § 11503, which prohibits discriminatory state taxation of railroad property[63] and (b) § 1513(d), which similarly shields air carrier property.[64] If the states cannot protect struggling entities by classifying them for a more favorable tax treatment, neither can Congress (the latter by failing to extend its protective arm to less deserving public service corporations) command the states to discriminate against businesses in interstate commerce in a manner that offends the U.S. Supreme Court's Commerce Clause jurisprudence.[65] I would hence re-

---

[59] The pertinent terms of Art. 1, § 8, cl. 3, U.S.Const., are:

"The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States. . . ."

[60] *Bacchus, supra* note 58, 468 U.S at 272-273, 104 S.Ct. at 3056.

[61] Burlington Northern Railroad Company v. Oklahoma Tax Commission, 481 U.S. 454, 457, 107 S.Ct. 1855, 1857, 95 L.Ed.2d 404 (1987)(quoting from § 101(a), 90 Stat. 31).

[62] Public Law 97-248, Sept. 3, 1982, 96 Stat. 324.

[63] For the pertinent terms of 49 U.S.C. § 11503, see *supra* note 16; *see also Burlington Northern, supra* note 61, 481 U.S. at 457, 107 S.Ct. at 0858.

[64] For the pertinent terms of 49 U.S.C. § 1513(d), see *supra* note 17.

fuse today to give our imprimatur to federal legislation that places state governments in violation of the Commerce Clause by giving some public service corporations favorable tax treatment in an attempt to improve their financial stability, while denying the same economic advantage to others through an impermissible regime of *thriving/struggling* industry classification.

VIII

THE COURT'S ANALYSIS LEADS IT TO AN INDEFENSIBLE CONCLUSION

The State Board's *under*assessment of air carrier and railroad property will not pass constitutional muster under the 14th Amendment. The equal protection component of the 14th Amendment prohibits *that* state action which imposes on some members of a class burdens and liabilities which are not cast upon others similarly situated.[66] It makes no difference here whether the *under*assessment of air carrier or railroad property comes about because of deliberate action by the State Board, legislative enactments or by federal-law compulsion. The impact remains the same. The 14th Amendment's Equal Protection Clause commands that pipeline property be accorded tax treatment that *is the same* as that extended to other public service corporations. In short, by *under*assessing railroad and air carrier property, *the state has denied the pipelines equal protection of the law.*

Because our constitutional command — that public service corporation property be taxed uniformly[67] — is not and has not been shown to offend against any federal fundamental-law mandate, we cannot use today federal preemption as an excuse for violating our own fundamental law.

---

[65] *Rhodes, supra* note 28, 393 U.S. at 29, 89 S.Ct. at 9-10, teaches that the powers granted by the Constitution to the Congress or to the states "are

IX

NATURE OF RELIEF TO BE GRANTED AS A REMEDY FOR THE OFFENDING ASSESSMENT RATIO

I would direct today that, upon due notice and hearings, the State Board set an across-the-board assessment ratio for *all* public service corporations. On the State Board's failure to do so within some reasonable period of time to be set by the court, I would direct that the petitioners could discharge their ad valorem tax liability at the assessment ratio now applicable *solely* to railroads and air carriers.[68]

Because my solution represents a *sharp break* with recent practice, I would give it prospective effect and make it apply to this proceeding, to like challenges presently pending before the Court of Tax Review or before any administrative agency and

---

always subject to the limitation that they may not be exercised in a way that violate[s] other specific provisions to the Constitution."

[66] *Nordlinger, supra* note 4, 505 U.S. at __, 112 S.Ct. at 2331.

[67] *See* Part V, *supra*.

[68] Before promulgating the court's pronouncement *I would require the petitioners join in this case as parties respondent all railroads and air carriers presently benefiting from the acts* of Congress that are under consideration in this proceeding and would invite all those added entities to show cause why these acts should not be declared infirm for underinclusiveness.

"Where a statute is defective because of underinclusion . . . there exist two remedial alternatives: a court may either declare [it] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." Califano v. Westcott, 443 U.S. 76, 89, 99 S.Ct. 2655, 2663, 61 L.Ed.2d 382 (1979) (quoting Welsh v. United States, 398 U.S. 333, 361, 90 S.Ct. 1792, 1807-1808, 26 L.Ed.2d 308 (1970) (Harlan, J., concurring in result)); *Orr, supra* note 33, 440 U.S. at 272, 99 S.Ct. at 1108.

to challenges now in the appellate litigation process;[69] I would expressly reject any refund claims to be pressed by the adversely affected entities for overpayment of taxes assessed against their property at the impermissible ratio during any past years.[70] Changes to be implemented in the assessment ratio would be postponed to take effect during the fiscal year beginning July 1, 1996.

X

SUMMARY

Federal legislation which treats differently members of the same class without a rational basis for the imposed disparity cannot pass constitutional muster when measured *either by* the anti-discrimination component of the 5th Amendment's Due Process Clause *or* by the U.S. Supreme Court's Commerce Clause jurisprudence. The two federal acts in question here are fatally flawed by an impermissible underinclusion which affords some common carriers (railroads and air carriers) protection from discriminatory state ad valorem tax regime but excludes out-of-hand other members of the same class. State

[69] The prospective effect I would give today is known as the "pipeline doctrine". That doctrine saves from extinction those *interests presently in litigation* (i.e., the case before the court and cases pending before trial tribunals or in the appellate litigation process) *or capable of being litigated* when the new rule is announced. For Oklahoma jurisprudence applying a new rule of law to cases in the *pipeline* see Amoco Production v. Corp. Com'n of Okl., Okl.App., 751 P.2d 203, 208 (1986); Schepp v. Hess, Okl., 770 P.2d 34, 39 (1989); Dow Jones & Co. v. State ex rel. Tax Com'n, Okl., 787 P.2d 843, 847 (1990); Strelecki v. Oklahoma Tax Comm'n, Okl., 872 P.2d 910, 915 n. 44 (1994); Schulte v. Oklahoma Tax Commission, Okl., 882 P.2d 65, 75 (1994). James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439, 2444-2445, 115 L.Ed.2d 481 (1991), is a U.S. Supreme Court refinement of the pipeline doctrine aimed at securing equality for all claims that are pending, or for those capable of being litigated, when the new rule is announced; *see also* Harper v. Virginia Dept. of Taxation, 509 U.S. __, 113 S.Ct. 2510, 2518, 125 L.Ed.2d 74 (1993).

[70] *Schulte, supra* note 69 at 74.

legislation passed in response to these federal-law commands clearly violates the 14th Amendment. Because under my analysis the two federal acts are clearly constitutionally infirm, I would hold today that they cannot operate to preempt contrary state law. The State Board should hence be declared free of federal-law restraint, and indeed *required by our own fundamental law*, to set a reasonable assessment ratio that *equally impacts the property of all public service corporations*. On the State Board's failure to act timely by establishing the required, even-handed assessment ratio, I would extend the benefit of the lower (railroad and air carrier) ratio to *all challengers*, who on like grounds are presently pressing claims before the Court of Tax Review or before any administrative agency, and to all those whose challenges are now in the appellate litigation process.

Lastly, I would give prospective effect to my pronouncement, making it apply to this case, to like challenges *presently* pending before the Court of Tax Review or before any administrative agency and to challenges *now* in appellate litigation process; I would expressly *reject* any refund claims to be pressed (by the adversely affected entities) for overpayment of taxes assessed against their property at the impermissible ratio during *any* past period and would postpone the effective date of the nonoffending ratio to be established to the fiscal year commencing July 1, 1996.

Appendix B

In the Supreme Court of the State of Oklahoma

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR 7, 1995
JAMES W. PATTERSON
CLERK

The Clerk is directed to issue to following orders:

82,410 ***John and Patty McCown etc. v. City of Elk City et. al.***
Petition for certiorari denied.
CONCUR: Hodges, Lavender, Simms, Hargrave, Opala, Summers, Watt, JJ.
DISSENT: Wilson, C.J., Kauger, V.C.J.

82,671 ***Randy and Patty Martin v. Jack Yates etc. et al.***
Petition for certiorari denied.
CONCUR: All Justices concur.

82,821 ***(comp. w/ 82,822) The State of Oklahoma v. Jiminez Geraldo Escobar v. American Bankers Life Insurance Company.***
Petition for certiorari denied.
CONCUR: All Justices concur.

82,822 ***(comp. w/ 82,821) The State of Oklahoma v. Gerardo Melchor Madrigal v. American Bankers Life Insurance Company.***
Petition for certiorari denied.
CONCUR: All Justices concur.

83,143 ***Floyd Electric Motor Company, Inc. v. Professional Services Group, Inc.***
Petition for certiorari denied.
CONCUR: All Justices concur.

83,255 ***In the Matter of the Estate of Henry Treisa and Verda M. Treisa, deceased.***
Petition for certiorari denied.
CONCUR: Kauger, V.C.J., Lavender, Simms, Hargrave, Opala, Summers, JJ.
DISSENT: Wilson, C.J., Hodges, Watt, JJ.

83,420 ***Warehouse Market, Inc. etc. v. Charles Daniel Sayre et al.***
Petition for certiorari denied.
CONCUR: All Justices concur.

84,097 ***Williams Natural Gas Company et al. v. State Board of Equalization and Oklahoma Tax Commission.***
Petitions for rehearing denied. Petitioners and Intervenors motion to stay denied
VOTE ON REHEARING:
CONCUR: Kauger, V.C.J., Hodges, Simms, Hargrave, Summers, Watt, JJ.
DISSENT: Wilson, C.J., Lavender, Opala, JJ.
VOTE ON MOTION TO STAY DENIED:
CONCUR: All Justices concur.

Response due: 6-5

Docketed: 3-8 cm

/s/ Alma Wilson
CHIEF JUSTICE

Appendix C

49 U.S.C. § 11503.
Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds that

tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in 'controversy or citizenship of the parties,' a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Appendix D

Title 49. Transportation

Subtitle VII. Aviation Programs
Part A. Air Commerce and Safety
Subpart I. General
Chapter 401. General Provisions

49 U.S.C. § 40116 (1994)

Section 40116. State Taxation

(a) Definition. In this section, "State" includes the District of Columbia, a territory or possession of the United States, and a political authority of at least 2 States.

(b) Prohibitions. Except as provided in subsection (c) of this section and section 40117 of this title, a State or political subdivision of a State may not levy or collect a tax, fee, head charge, or other charge on - -

(1) an individual traveling in air commerce;

(2) the transportation of an individual traveling in air commerce;

(3) the sale of air transportation; or

(4) the gross receipts from that air commerce or transportation.

(c) Aircraft taking off or landing in State. A State or political subdivision of a State may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft only if the aircraft takes off or lands in the State or political subdivision as part of the flight.

(d) Unreasonable burdens and discrimination against interstate commerce.

(1) In this subsection - -

(A) "air carrier transportation property" means property (as defined by the Secretary of Transportation) that an air carrier providing air transportation owns or uses.

(B) "assessment" means valuation for a property tax levied by a taxing district.

(C) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(D) "commercial and industrial property" means property (except transportation property and land used primarily for agriculture or timber growing) devoted to a commercial or industrial use and subject to a property tax levy.

(2) (A) A State, political subdivsion of a State, or authority acting for a State or political subdivision may not do any of the following acts because those acts unreasonably burden and discriminate against interstate commerce:

(i) assess air carrier transportation property at a value that has a higher ratio to the true market value of the property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(ii) levy or collect a tax on an assessment that may not be made under clause (i) of this subparagraph.

(iii) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate greater than the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(iv) Levy or collect a tax, fee, or charge, first taking effect after the date of the enactment of this clause, exclusively upon any business located at a commerical service airport or operating as a permittee of such an airport other than a tax, fee, or charge wholly utilized for airport or aeronautical purposes.

(B) Subparagraph (A) of this paragraph does not apply to an in lieu tax completely used for airport and aeronautical purposes.

(e) Other allowable taxes and charges. Except as provided in subsection (d) of this section, a State or political subdivision of a State may levy or collect - -

(1) taxes (except those taxes enumerated in subsection (b) of this section), including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and

(2) reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision.

(f) Pay of air carrier employees.

(1) In this subsection - -

(A) "pay" means money received by an employee for services.

(B) "State" means a State of the United States, the District of Columbia, and a territory or possession of the United States.

(C) an employee is deemed to have earned 50 percent of the employee's pay in a State or political subdivision of a State in which the scheduled flight time of the employee in the State or subdivision is more than 50 percent of the total scheduled flight time of the employee when employed during the calendar year.

(2) The pay of an employee of an air carrier having regularly assigned duties on aircraft in at least 2 States is subject to the income tax laws of only the following:

(A) the state or political subdivision of the State that is the residence of the employee.

(B) the State or political subdivision of the State in which the employee earns more than 50 percent of the pay received by the employee from the carrier.

(3) Compensation paid by an air carrier to an employee described in subsection (a) in connection with such employee's authorized leave or other authorized absence from regular duties on the carrier's aircraft in order to perform services on behalf of the employee's airline union shall be subject to the income tax laws of only the following:

(A) The State or political subdivision of the State that is the residence of the employee.

(B) The State or political subdivision of the State in which the employee's scheduled flight time would have been more than 50 percent of the employee's total scheduled flight time for the calendar year had the employee been engaged full time in the performance of regularly assigned duties on the carrier's aircraft.

HISTORY: (July 5, 1994, P.L. 103-272, @ 1 (e), 108 Stat. 1111; Aug. 23, 1994, P.L. 103-305, Title I, @ 112 (e), Title II, @ 208, 108 Stat. 1576, 1588.)

Appendix E

§ 2864
State Board of Equalization—Membership – Sessions – Officers – Quorum – Powers, duties and authority

A. The Governor, State Auditor and Inspector, State Treasurer, Lieutenant Governor, Attorney General, Superintendent of Public Instruction and President of the Board of Agriculture shall constitute the State Board of Equalization, and the State Board of Equalization must hold a session at the Capitol of the State, commencing at ten o'clock a.m. on December 1, or the first working day thereafter of each year for the purpose of equalizing the taxable property values of the several counties for the next following assessment year. The State Auditor and Inspector shall notify all other members of said Board of the time and place of said annual session as herein required. The Governor shall serve as chairman and the State Auditor and Inspector shall serve as secretary of said Board, and vice-chairman shall be elected from the other members. In case of the absence or failure of said chairman and secretary, or either of them, to so act on the statutory meeting date, any four or more members thereof shall proceed on said date to conduct the Board's session and carry on its work as herein required. Any official action by said Board shall require approval by a majority of all members of the Board.

B. It shall be the duty of said State Board to examine the various county assessments and to equalize, correct and adjust the same as between and within the counties by determining the ratio of the aggregate assessed value of the property or any class thereof, in any or all of them, to the fair cash value thereof as herein defined, and to order and direct the assessment rolls of any county in this state to be so corrected as to adjust and

equalize the valuation of the real and personal property among the several counties during the next succeeding assessment year.

C. In determining the assessment ratio for all air carrier property and all railroad property, the State Board shall only consider the ratio of the aggregate assessed value to the fair cash value of the locally assessed commercial/industrial real property of the state.

D. In order to equalize, correct and adjust the various county assessments within the counties as required by this section, the State Board of Equalization shall analyze the relationship between the assessed value and the fair cash value for each use category of real property and separately analyze the relationship between the assessed value and the fair cash value for the agricultural use category, the residential use category and the commercial/industrial use category. If Article X, Section 8 of the Oklahoma Constitution provides for a system in which less than one hundred percent (100%) of value is taxable, the State Board of Equalization shall order any increase or decrease determined by the State Board of Equalization to be necessary for equalization of property values within the county, including, but not limited to, the authority to require an assessment ratio for a use category bearing a specific relationship to the percentage used to determine taxable value of real property in the county for the applicable assessment year. If Article X, Section 8 of the Oklahoma Constitution provides for a system in which one hundred percent (100%) of value is taxable, the State Board of Equalization shall make such order as authorized by Article X, Section 8 of the Oklahoma Constitution.

E. The State Board of Equalization shall equalize, correct and adjust the various county assessments as between the counties as required by this section by ordering any increase or decrease required as prescribed by this subsection. If Article X, Section 8 of Oklahoma Constitution provides for a system in which less than one hundred percent (100%) of value is taxable,

the State Board of Equalization shall order any increase or decrease required to comply with the minimum or maximum acceptable assessment ratio in effect for the applicable assessment year. If Article X, Section 8 of the Oklahoma Constitution provides for a system in which one hundred percent (100%) of value is taxable, the State Board of Equalization shall order any increase or decrease required to ensure that the assessment ratio for any county is not less than ninety-two percent (92%) and not greater than one hundred percent (100%) as provided by Article X, Section 8 of the Oklahoma Constitution.

Laws 1988, c. 162, § 64, eff. Jan. 1, 1992. Laws 1990, c. 212, § 2, eff. Jan. 1, 1992.